

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON

March 24, 2008 Session

JENNIFER KELLY v. DOLLAR GENERAL CORPORATION

Direct Appeal from the Chancery Court for Shelby County
Nos. CH-04-0828-2 and CH-04-0705-1 Walter L. Evans, Chancellor

No. W2007-01105-SC-WCM-WC - Mailed July 15, 2008; Filed September 25, 2008

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3) (Supp. 2007) for a hearing and a report of findings of fact and conclusions of law. The employee had separate claims for carpal tunnel syndrome and a back injury. The trial court awarded 30% permanent partial disability for the carpal tunnel injury but dismissed the back claim. Both sides have appealed. The employer contends that the trial court erred in finding that the employee sustained her burden of proof as to causation of the carpal tunnel syndrome. The employee contends that the trial court erred in finding that she had failed to sustain her burden of proof as to permanent disability arising from her back injury. We affirm the judgment concerning the carpal tunnel claim, reverse the judgment concerning the back claim, and remand the case to the trial court.

Tenn. Code Ann. § 50-6-225(e) (Supp. 2007) Appeal as of Right;
Judgment of the Chancery Court Affirmed in Part, Reversed in Part, and Remanded

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and ALLEN M. WALLACE, SR. J., joined.

Gregory D. Jordan and W. Paul Whitt, Jackson, Tennessee, for the appellant, Dollar General Corporation.

Steve Taylor, Memphis, Tennessee, for the appellee, Jennifer Kelly.

MEMORANDUM OPINION

FACTUAL AND PROCEDURAL BACKGROUND

This is the second appeal in this case. Jennifer Kelly alleged that she sustained both carpal tunnel syndrome and a back injury as a result of her employment with Dollar General Corporation. Previously, the trial court had entered summary judgment for Dollar General on the back claim,

based upon the statute of limitations. The trial court had dismissed the carpal tunnel syndrome claim after a trial on the merits, finding that Ms. Kelly had not provided timely notice of her injury. Kelly v. Dollar General Corp., Nos. W2005-1891-SC-WCM-CV & W2005-1174-SC-WCM-CV, 2006 WL 2924815 (Tenn. Workers' Comp. Panel Sept. 25, 2006). The Special Workers' Compensation Appeals Panel reversed both of these determinations and remanded the case for further proceedings. Id. at *6. After remand, the cases were tried together in the Chancery Court of Shelby County, resulting in the judgments which are the subject of this appeal.

Ms. Kelly began working for Dollar General in 2000. She was hired as a "third key manager" of one of Dollar General's stores, which meant that she ran the store during her shift. She later became assistant manager and then manager at the store. Her responsibilities included operating a cash register, loading and unloading trucks, stocking shelves, managing the schedules of other employees, tabulating sales information, and completing reports. Her back injury occurred in January or February of 2001, when she fell while assembling a conveyor that was to be used to unload a truck. When she fell, the conveyor fell on her. Ms. Kelly testified that she was the assistant store manager at the time and reported the incident to the store manager, Annette Ross. Ms. Ross did not testify. Ms. Kelly did not request that Dollar General provide her with medical treatment at that time.

On February 21, 2001, she, without notice to Dollar General, consulted Dr. Mike Lemonds, who later became her primary care physician. She complained of low back pain and told him she had hurt her back. Dr. Lemonds failed to note and could not recall if she told him "where or when or how." Dr. Lemonds prescribed conservative treatment. She returned to him on several occasions over the following weeks. He ordered a magnetic resonance imaging ("MRI") study, which was performed on March 20, 2001, and showed a herniated disc at the L5-S1 level and degenerative changes at other levels of her spine. Ms. Kelly continued to have symptoms, and Dr. Lemonds continued to provide conservative treatment over the next two years. Ms. Kelly's back pain periodically worsened during that time.

Beginning in April or May of 2001, Ms. Kelly began to experience numbness, tingling, and burning in her hands. She advised Dr. Lemonds of these symptoms on May 21, 2001. When the symptoms continued to worsen in the latter part of 2002, Dr. Lemonds suggested that a nerve conduction study be performed. This test was positive for bilateral carpal tunnel syndrome.

Ms. Kelly continued to work for Dollar General until November 2003. At that time, she was terminated for violation of a company policy concerning employee check cashing.

Ms. Kelly was referred by her attorney to Dr. Tewfik Rizk, an orthopaedic surgeon, in April 2004. Dr. Rizk evaluated her low back pain and diagnosed nerve root irritation at L5-S1 with radiculopathy. In October 2004, Dr. Rizk ordered a nerve conduction study of Ms. Kelly's lower extremities. This test confirmed his diagnosis. Based upon the history given to him, Dr. Rizk was of the opinion that the most likely cause of this injury was her fall at work in 2001. He assigned a permanent impairment of 12% to the body as a whole. Dr. Rizk testified that Ms. Kelly "should not be involved in any kind of activity which necessitates repetitive back movement such as pushing,

pulling, lifting more than 25 to 30 pounds.” Dr. Rizk did not consider Ms. Kelly to be a surgical candidate.

Ms. Kelly was also examined in April 2004 by Dr. Joseph Boals, also an orthopaedic surgeon, at the request of her attorney. Dr. Boals confirmed the diagnosis of carpal tunnel syndrome. Assuming that Ms. Kelly used her hands on a repetitive basis during her work activities, Dr. Boals expressed his opinion that her work at Dollar General was the probable cause of her carpal tunnel syndrome. He assigned impairment of 10% to each arm. He recommended that she “avoid repetitive work and heavy gripping.” On cross-examination, Dr. Boals testified that persons whose activities included repetitive gripping with pressure, squeezing, typing, or driving were more likely to develop carpal tunnel syndrome. Persons whose activities included these elements but who varied their activities during the work day were less likely to develop the condition.

Each side presented the testimony of a vocational expert. Ms. Kelly’s witness was Dr. David Strauser. Dr. Strauser testified that Ms. Kelly was able to read, spell, and perform math at a high school level. He opined that she retained 39% vocational disability due to her carpal tunnel syndrome and an additional 34% vocational disability due to her back injury.

Karen Vessell testified on behalf of Dollar General. She opined that Ms. Kelly retained a 15% vocational disability due to carpal tunnel syndrome and 22% vocational disability due to her back injury.

Ms. Kelly was forty-nine years old and a high school graduate. Prior to being hired by Dollar General, she had been a cashier and office clerk at a similar retail store for eleven years. She had also worked as a restaurant manager. After being terminated by Dollar General, she did not work for over a year. She eventually obtained employment at a convenience store and held that job at the time of trial. She testified that she can no longer perform heavy lifting because of the carpal tunnel syndrome. She has difficulty sleeping as a result of that condition. Her back causes her to “have a lot of trouble standing for long periods of time.” She testified that if she has to bend or do any lifting, it is very painful. She also described her inability to sit for long periods of time and difficulty sleeping because of her back.

The trial court held that Ms. Kelly failed to carry her burden of proof that she sustained a permanent disability as a result of her back injury and dismissed that claim.³ The court awarded 30% permanent partial disability to both arms as a result of the carpal tunnel syndrome and judgment was entered accordingly. Both parties have appealed from that judgment. Dollar General contends that the trial court erred by finding that Ms. Kelly developed bilateral carpal tunnel syndrome as a result of her employment. In the alternative, Dollar General argues that the award is excessive. Ms. Kelly contends that the trial court erred by finding that she failed to prove that she sustained a permanent injury to her lower back.

³The judgment dismissing this claim refers to Findings of Fact and Conclusions of Law entered on March 22, 2007. This document is not contained in the record.

STANDARD OF REVIEW

The standard of review of issues of fact is de novo upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (Supp. 2007). When credibility and weight to be given testimony are involved, the trial court's findings are entitled to considerable deference because the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). Where the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions concerning those issues. Bohanan v. City of Knoxville, 136 S.W.3d 621, 624 (Tenn. 2004); Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997); Elmore v. Travelers Ins. Co., 824 S.W.2d 541, 544 (Tenn. 1992). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 826 (Tenn. 2003); Ganzevoort v. Russell, 949 S.W.2d 293, 296 (Tenn. 1997).

ANALYSIS

1. Causation, Carpal Tunnel Syndrome

Dollar General contends that the trial court erred by finding that Ms. Kelly's carpal tunnel syndrome was work-related. It notes that her job duties were varied, involved a number of different tasks, and did not include the constant or repetitive activity that Dr. Boals testified was more likely to cause carpal tunnel syndrome. Dr. Boals made statements that can be fairly read to assume that Ms. Kelly would testify that her job required heavy and repetitive use of her hands. Dr. Boals had, however, a general awareness of Ms. Kelly's work activities. He did not change his opinion that Ms. Kelly's injuries were work-related based upon the questions posed to him on cross-examination but merely stated that it was less likely that a varied group of activities, such as that which Ms. Kelly testified to, would cause carpal tunnel syndrome. He also testified that idiopathic carpal tunnel syndrome is rare and did not indicate Ms. Kelly had any of the other physical conditions enumerated by him as causing carpal tunnel problems.⁴

Ms. Kelly's evidence on the issue of causation is marginal. However, Dollar General did not present any evidence that directly supports its position that the types of activities associated with Ms. Kelly's job were not likely to cause carpal tunnel syndrome. The only testimony on the subject is that of Dr. Boals. While he testified that a person performing a varied range of activities that included gripping, squeezing, and typing was less likely to develop carpal tunnel syndrome than a person who performed the same activity repetitively, he maintained his opinion that Ms. Kelly's carpal tunnel syndrome was related to her employment. Dollar General neither cited nor presented

⁴These conditions included pregnancy, rheumatoid arthritis, and hypothyroidism.

evidence of any other activity or condition of Ms. Kelly that might have resulted in carpal tunnel syndrome. According to Dr. Boals, it rarely occurs without a cause.

In considering this evidence, we must resolve all reasonable doubts as to causation in favor of the employee, Phillips v. A. & H Constr. Co., 134 S.W.3d 145, 150 (Tenn. 2004). Moreover, a presumption of correctness attaches to the trial court's findings. Skinner v. CNA Ins. Co., 824 S.W.2d 164, 166 (Tenn. 1992). Having carefully reviewed the testimony of Ms. Kelly and the deposition testimony of Dr. Boals, we are unable to find that the evidence preponderates against the trial court's finding that Ms. Kelly sustained her burden of proof as to the issue of causation relating to her carpal tunnel syndrome.

2. Extent of Disability, Carpal Tunnel Syndrome

Dollar General argues that the award of 30% permanent partial disability to both arms for the carpal tunnel syndrome is excessive. It contends that the vocational analysis testimony of Ms. Vessell was more persuasive than that of Dr. Strauser. Both experts equated vocational disability to a reduction in access to the job market. Dollar General argues that Ms. Vessell based her opinion upon extensive background studies of individual jobs, while Dr. Strauser based his opinion upon what jobs generally entail. Thus, Dollar General argues that Dr. Strauser eliminated job opportunities that Ms. Kelly could perform with minor modifications. It further complains that Dr. Strauser eliminated work that Ms. Kelly was qualified to perform based upon the restrictions recommended by her evaluating physicians. Dollar General also contends that Ms. Kelly's continued work at her regular job for over two years after the injury without accommodations demonstrates that she has minimal disability.

The record does not indicate what factors the trial court relied upon in determining the extent of Ms. Kelly's permanent disability. Nor does the record reflect what weight, if any, the trial court attached to the testimony of either of these experts. In assessing the extent of an employee's vocational disability, the trial court may consider the employee's skills and training, education, age, local job opportunities, anatomical impairment rating, and her capacity to work at the kinds of employment available in her disabled condition. Tenn.Code Ann. § 50-6-241(b) (1999); Worthington v. Modine Mfg. Co., 798 S.W.2d 232, 234 (Tenn.1990); Roberson v. Loretto Casket Co., 722 S.W.2d 380, 384 (Tenn.1986). Further, the claimant's own assessment of her physical condition and resulting disabilities cannot be disregarded. Uptain Constr. Co. v. McClain, 526 S.W.2d 458, 459 (Tenn.1975); Tom Still Transfer Co. v. Way, 482 S.W.2d 775, 777 (Tenn.1972).

Ms. Kelly was nearly fifty years old. She was able to perform her normal job duties after her injury. Her termination was for reasons unrelated to her injury. However, after her termination she was unable to find a new job for over a year. She testified that she had difficulty performing some aspects of the job that she eventually obtained. The restrictions suggested by Dr. Boals are significant. After a careful review of the record, we cannot say that the evidence preponderates against the trial court's judgment on this issue.

3. Causation, Back Injury

Ms. Kelly contends that the trial court erred in dismissing her back injury claim. Dollar General contends that Ms. Kelly's continued work at her regular job without accommodation and with minimal medical treatment for over two years supports the trial court's conclusion.

Ms. Kelly testified that she injured her back when she fell at work in January or February 2001. There is no contradictory evidence in the record. Ms. Kelly testified she reported the accident to her supervisor, Annette Ross. Again, that evidence was not contradicted. An MRI scan taken in March 2001 revealed a herniated disc in her lower back. Dr. Rizk testified that the most likely cause of that injury was the fall that occurred a few weeks before the MRI. Dr. Lemonds testified that if Ms. Kelly did hurt her back as she described, "it is a reasonable thing to say . . . that could have led to the herniated disc" demonstrated by the MRI. There is no other medical testimony on the subject. Because Ms. Kelly was able to continue to perform her regular duties for a significant period of time after the February 2001 event, Dollar General asks us to infer that the injury occurred in some other unspecified way, at some other unspecified time. No medical proof was offered to provide support for that inference. When the employee presents medical proof that his or her employment caused or could have caused an injury, that is sufficient to make out a prima facie case that the injury arose out of the employment. If the employer introduces no evidence to the contrary, the preponderance of evidence supports an award of worker's compensation benefits. Clark v. Nashville Mach. Elevator Co., 129 S.W.3d 42, 49 (Tenn. 2004); King v. Jones Truck Lines, 814 S.W.2d 23, 29 (Tenn. 1991).

Analyzing the record in that light, Dr. Rizk's testimony in this case provides an evidentiary basis for the existence of a causal relationship between the February 2001 event and Ms. Kelly's herniated disk. There is no medical evidence in the record to support Dollar General's position that her performance of her normal employment duties in the months after February 2001 is inconsistent with the occurrence of a herniated disc in February 2001. In the absence of such proof, we must conclude that the evidence preponderates against the finding of the trial court on this issue.

The trial court did not make an alternative finding concerning the extent of disability arising from the back injury. See Bldg. Materials Corp. v. Britt, 211 S.W.3d 706, 713-14 (Tenn. 2007). It is therefore necessary to remand the case to permit the trial court to assess permanent partial disability.

CONCLUSION

The judgment awarding 30% permanent partial disability to both arms for carpal tunnel syndrome is affirmed. The judgment dismissing Ms. Kelly's back injury claim is reversed, and the case is remanded to the trial court for further proceedings in accordance with this opinion. Costs are taxed to Dollar General Corporation and its surety, for which execution may issue if necessary.

DONALD P. HARRIS, SENIOR JUDGE

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No. W2007-01105-SC-WCM-WC - Filed September 25, 2008

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Dollar General Corporation, pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to Dollar General Corporation, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Holder, Janice M., J., not participating